Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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| In the Matter of | |
| Implementation of Section 302 of the Telecommunications Act of 1996 | CS Docket No. 96-46 |
| Open Video Systems | |



To: The Commission

# REPLY COMMENTS OF THE NEW YORK CITY DEPARTMENT OF INFORMATION TECHNOLOGY AND TELECOMMUNICATIONS

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The New York City Department of Information Technology and Telecommunications ("City of New York" or "City") submits these reply comments in connection with the Federal Communications Commission's ("FCC" or "Commission") Notice of Proposed Rulemaking ("Notice") in the above-captioned proceeding.

## I. INTRODUCTION

The City of New York is sensitive to the enormous workload placed on the Commission by the Telecommunications Act of 1996[1] and the difficult but important task presented to the Commission in this proceeding. The Commission must steer a path that implements the congressional mandate to provide telephone companies broad flexibility in determining how to enter the multichannel video distribution market while protecting the

[1] Telecommunications Act of 1996, Pub. L. No. 104-104, § 302, 110 Stat. 56 (approved Feb. 8, 1996) ("1996 Act"), amending the Communications Act of 1934, Pub. L. No. 73-416, 48 Stat. 1064 (1934), codified at 47 U.S.C. § 151 et seq. ("Communications Act").

public from improper cross-subsidization, anti-competitive conduct, monopolization of communications, and loss of the ability to effectively manage public property. The City therefore supports the many commenters who have noted the incentive and ability Local Exchange Carriers ("LECs") in the Open Video System ("OVS") context will have to engage in anti-competitive and discriminatory conduct. The public interest demands effective safeguards to forestall such behavior. In addition, we support those commenters advocating the implementation of applicable Title VI requirements to OVS operators in each jurisdiction where such operators provide service. Finally, we believe the plain language of the Telecommunications Act of 1996, its underlying purposes, its legislative history, and the public interest clearly demonstrate that incumbent cable television franchisees must be prohibited from operating OVS networks.

The City believes the suggestions raised in comments submitted by various local governments and consumer protection advocates will serve to protect the public while supporting the goals of Section 302; i.e.: (1) to promote competition between telephone companies and cable television operators in the video program distribution market; (2) to encourage investment in new technologies; and (3) to maximize the consumers' choice of information and entertainment services.

## II. DISCUSSION

### A. Appropriate Safeguards Must Be Implemented To Protect The Public From Anti-Competitive And Discriminatory Conduct

As many commenters have noted, LECs operating OVS platforms will have both the incentive and the ability to engage in anti-competitive and discriminatory behavior designed to favor affiliated entities and obstruct independent programming suppliers.[2] In light of the extremely abbreviated period given the Commission to approve or deny certifications in OVS applications,[3] the City believes that certain pre-certification safeguards will be necessary if the public is to be protected from potential anti-competitive and discriminatory LEC conduct, including improper cross-subsidization. We therefore support the commenters who have urged the Commission to establish appropriate safeguards to ensure reasonable rates, terms, and conditions as well as compliance with the non-discrimination provisions of the 1996 Act.[4] Such safeguards should require LECs to offer OVS and

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[2] See, e.g., Comments of Time Warner Cable, CS Docket No. 96-46, at 18-24 (filed Apr. 1, 1996) ("Time Warner Comments"); Joint Comments of Cablevision Systems Corp. and the California Cable Television Association, CS Docket No. 96-46, at 32-35 (filed Apr. 1, 1996) ("Cablevision Comments"); Comments of MCI, CS Docket No. 96-46 (filed Apr. 1, 1996).

[3] I.e., ten days. Communications Act § 653(a)(1).

[4] Comments of the Motion Picture Association of America, Inc., CS Docket No. 96-46 (filed Apr. 1, 1996) ("MPAA Comments"); Time Warner Comments; Cablevision Comments; Comments of MCI; Comments of the Alliance for Community Media, Alliance for Communications Democracy, Consumer Federation of America, Consumer Project on Technology, Center for Media Education, and People for the American Way, CS Docket No. 96-46, at 36 (filed Apr. 1, 1996) ("Alliance Comments"); Comments of the National League of Cities, the United States Conference of Mayors, the National Association of Counties, the National Association of Telecommunications Officers and Advisors, Montgomery County Maryland, the City of Los Angeles California, the City of

associated programming through a fully separate subsidiary and must include compliance with cost allocation requirements as a prerequisite to the Commission's approval of an OVS certification. In addition, the City agrees with those commenters who have argued that a case-by-case adjudication procedure for complaints alleging violations of the non-discrimination provisions, rather than establishing specific OVS regulations and standards, would unfairly shift the burden of identifying regulatory needs from the industry to individual litigants.[5] Contrary to the arguments raised by Bell Atlantic, the City agrees with the majority of commenters that certain pre-certification compliance requirements are necessary to protect the public.[6]

**B. Cable Television Operators Must Be Prohibited From Becoming Open Video System Operators**

As the Commission observed in the *Notice*, new subsection 653(a)(1) of the Communications Act provides that:

> A local exchange carrier may provide cable service to its cable service subscribers in its telephone service area through an open video system that complies with this section. To the extent permitted by such regulations as the Commission may prescribe consistent with the public interest, convenience, and necessity, an operator of a cable system or any other person may provide video programming through an open video system that complies with this section.[7]

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Chillicoth Ohio, the City of Dearborn Michigan, the City of Dubuque Iowa, the City of St. Louis Missouri, the City of Santa Clara California, and the City of Tallahassee Florida, CS Docket No. 96-46, at 46-52 (filed Apr. 1, 1996) ("NLC Comments").

[5] *See, e.g.*, Time Warner Comments at 18-24;

[6] *See, e.g.*, Comments of Continental Cablevision, Inc., CS Docket No. 96-46, at 11 (filed Mar. 29, 1996); Alliance Comments at 14-19, 24-25.

[7] Communications Act § 653(a)(1) (emphasis added).

The Communications Act, therefore, allows an LEC to provide cable service through an Open Video System, but limits others to providing video programming through such a system to the extent permitted by Commission regulations. Both the plain language of the statute and its underlying purpose-to introduce vigorous competition in entertainment and information markets-make such an interpretation inevitable. Contrary to the strained arguments advanced by some commenters, the terms "cable service" and "video programming" cannot be construed as interchangeable.[8] Indeed, such a construction would render the second sentence of Section 653(a)(1) superfluous and the separate definitions provided by the Communications Act meaningless.[9]

Nothing in either the 1996 Act or its legislative history suggests that cable operators should be permitted to become OVS operators. Section 302 of the 1996 Act is entitled "Cable Service Provided By Telephone Companies" (emphasis added). It creates a new Part V in Title VI of the Communications Act that is denominated as "Video Programming Services Provided By Telephone Companies" (emphasis added). The language therein deals exclusively with the operation of OVS and the carriage of video traffic by "common carriers" or "local exchange carriers." Moreover, the Conference Report makes clear that Congress "recognize[d] that telephone companies need to be able to choose from among multiple video entry options" and that the OVS portion

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[8] See Cablevision Comments at 32-35.

[9] See Communications Act, §§ 602(6) (as amended) and 602(19), 47 U.S.C. §§ 522(6) and 522(19).

of the 1996 Act "focuses on the establishment of open video systems by local exchange carriers."[10]

> New Section 653(c) sets forth the reduced regulatory burdens imposed on open video systems. There are several reasons for streamlining the regulatory obligations of such systems. First, the conferees hope that this approach will encourage common carriers to deploy open video systems and introduce vigorous competition in entertainment and information markets. Second, the conferees recognize that common carriers that deploy open video systems will be "new" entrants in established markets and deserve lighter regulatory burdens to level the playing field. Third, the development of competition and the operation of market forces mean that government oversight and regulation can and should be reduced.[11]

The City's conclusion regarding the statutory language of Section 653(a)(1) is dictated by the pro-competitive purposes of the 1996 Act. Allowing incumbent cable operators to become OVS operators within their franchised service areas will clearly neither enhance competition, maximize consumer choice, nor create an outlet for unaffiliated video programming providers. In fact, these important goals would be greatly undermined if an incumbent cable operator were permitted to merely duplicate its cable service on an OVS in its franchised service area. Under such a scenario, consumers would not have more choice, competition would be reduced, and fewer outlets would be available for unaffiliated video programming providers. To protect the public interest, the Commission should interpret this subsection in conjunction with the joint venture prohibition in new Section 652 of the Communications Act; i.e.:

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[10] Telecommunications Act of 1996 Conference Report, H.R. Rep. 104-458, S. Rep. 104-230 at 177 (Feb. 1, 1996) ("Conference Report") (emphasis added).

[11] Id. at 178 (emphasis added).

> A local exchange carrier and a cable operator whose telephone service area and cable franchise area, respectively, are in the same market may not enter into any joint venture or partnership to provide video programming directly to subscribers or to provide telecommunications services within such market.[12]

Since the purpose of OVS is to encourage telephone companies to enter the video programming market in competition with cable television companies that currently dominate it, permitting cable companies to operate OVS networks simply makes no sense. Just as the buy-out and joint venture prohibitions of Section 652 promote competition by preventing certain combinations, so should the Commission ensure that cable operators are prevented from using OVS in a manner that diminishes potential competition between themselves and telephone companies in the video distribution market.

The City consequently supports the numerous commenters who have maintained that cable television companies must be precluded from operating any OVS network in its cable service area.[13] We believe that any other interpretation would permit, and indeed would encourage, incumbent cable operators to evade their existing lawful franchise obligations. Such a result would clearly be inconsistent with the public interest and is one Congress obviously did not intend.[14]

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[12] Communications Act § 652(c).

[13] Alliance Comments at 36; NLC Comments at 46-52; Comments of the Greater Metro Cable Consortium, CS Docket No. 96-46 (filed Mar. 29, 1996) ("GMCC Comments"); Comments of the Below-Named Political Subdivisions of the State of Minnesota, CS Docket No. 96-46, at 13 (filed Apr. 1, 1996) ("Minnesota Comments").

[14] "The 1996 Act was meant to draw telephone companies into the video programming market, not to allow already existing cable operators to escape their responsibilities to the public interest by providing a convenient exit from rate regulation and local

The Commission may wish to consider, however, whether and to what extent "competitive" cable operators[15] should be permitted to provide video programming over an OVS in an incumbent cable operator's franchise area. The City believes that permitting such cable operators access to the OVS may advance the above-mentioned goals. The Commission clearly has authority under the 1996 Act to prohibit incumbent cable operators from becoming OVS operators (which is dictated by the statute) and to regulate the cable operators' provision of video programming through an OVS in their franchised service areas.[16] On the other hand, encouraging competitive cable operators and unaffiliated programming providers to access the OVS will maximize consumer choice, provide real competition to incumbent cable operators, and provide an outlet for unaffiliated program providers. The City urges the Commission to consider this approach.

The City reiterates its belief that the underlying purposes of the 1996 Act provide an excellent guide as to what factors should govern the Commission's public interest determination under this subsection: (1) competition; (2) diversity of programming sources; and (3) maximum consumer

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public oversight." Alliance Comments at 37.

[15] I.e., cable operators and other video programming distributors not currently providing franchised cable service in the relevant jurisdiction.

[16] "To the extent permitted by such regulations as the Commission may prescribe consistent with the public interest, convenience, and necessity, an operator of a cable system or any other person may provide video programming through an open video system that complies with this section." Communications Act § 653(a)(1).

choice. Given the plain language of the statute and its legislative history, as well as the overall competitive goals of the OVS provisions in the 1996 Act, the City believes that cable television operators must be prohibited from becoming OVS operators while competitive cable operators should be permitted to provide video programming over a LEC's open video system.

### C. Applicable Title VI Provisions Must Be Implemented Equally To OVS And Cable Television Operators In Each Jurisdiction Where They Provide Service

Although OVS operators are not subject to cable television franchising requirements under new subsection 653(c) of the Communications Act,[17] such operators are subject to various other Title VI obligations in accordance with regulations to be prescribed by the Commission. Such obligations include, inter alia, reservation of channel capacity for public, educational, and governmental ("PEG") access[18] as well as mandatory carriage of local commercial and noncommercial educational broadcast television signals ("must-carry").[19]

In light of the important local needs to which these obligations are directed and the statutory mandate that such obligations be imposed on OVS operators to the same extent as on cable television operators, the City supports the overwhelming majority of commenters who maintain that all relevant Title VI

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[17] Communications Act § 653(c)(1)(C).

[18] Communications Act § 611, 47 U.S.C. § 531.

[19] Communications Act §§ 614 and 615, 47 U.S.C. §§ 534 and 535.

responsibilities must be applied to both OVS and cable television operators equally on a franchise-by-franchise basis.[20]

An OVS operator must be required to design its system in such a way that it is capable of duplicating the incumbent cable operator's PEG obligations in each franchise jurisdiction in which the OVS operator provides service. Where the cable operator's PEG obligations change due to a franchise renewal, the OVS operator must also be required to adjust its PEG obligations to match those of the cable operator. Given the statute's direction that such obligations be imposed to the same extent as on competing cable television operators and the reality of PEG obligations that vary among franchise areas, we believe this is the only equitable solution to this issue, irrespective of whether an OVS network overlaps several franchise jurisdictions with different PEG obligations.

The City has relevant experience in managing PEG obligations where two cable television franchise areas overlap a single jurisdiction. In Brooklyn, New York, both Time Warner Cable and Cablevision Systems Corporation operate cable television systems in different sections of the borough. Both companies support a single public access organization. The City has equitably managed both companies' PEG support obligations by establishing a capital fund to which each operator contributes based upon the number of subscribers they serve in the borough.

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[20] See, e.g., Continental Cablevision Comments at 3; Minnesota Comments at 5; Time Warner Comments at 24; Cablevision Comments at 20; Comments of Tele-Communications, Inc., CS Docket No. 96-46, at 17 (filed Apr. 1, 1996); Comments of the National Association of Broadcasters, CS Docket No. 96-46, at 11 (filed Apr. 1, 1996) ("NAB Comments").

We believe a similar arrangement would work well in the OVS context to ensure that PEG obligations are imposed equally on cable television and OVS operators.

As explained in the City's initial comments,[21] an OVS operator should be required to match the cable operator's PEG obligations in a franchise area. To promote the public interest in PEG access and avoid any unnecessary duplication of PEG facilities, equipment, and support, the Commission should grant local franchising authorities the right to establish the PEG requirements an OVS operator must meet to match the local cable operator's obligations. Local franchising authorities are in the best position to ascertain community needs and interests, and an OVS operator should not be required, for example, to build a PEG studio that the cable operator is required to build if the franchising authority determines it to be unnecessary. Rather, as long as the overall package of PEG support an OVS must provide does not exceed the cable operator's, the franchising authority should retain the flexibility to establish the components of such package.

Similarly, to ensure that every subscriber can receive the must-carry channels, the City supports those commenters who have observed that the OVS operator, as the system designer, must be responsible for ensuring that this is the case.[22] The Commission can and should require OVS subscribers to purchase a

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[21] Comments of the New York City Department of Information Technology and Telecommunications, CS Docket No. 96-46, at 7 (filed Apr. 1, 1996).

[22] NAB Comments at 17; Minnesota Comments at 5; NLC Comments at 28-45; MPAA Comments at ii, 14-15.

basic package of must-carry and PEG channels in the same manner that cable television subscribers are required to purchase a cable system's "basic tier." This would equitably apply the statutory mandate.

As the majority of commenters noted, all the regulatory and statutory obligations applicable to cable operators must apply equally to OVS operators in each franchise jurisdiction and television market in which they provide service. This applies equally to must-carry and retransmission consent stations. The OVS operator should be required to design its system to comply with all Title VI requirements applicable to each jurisdiction it serves, including the number of such stations, their channel position, and signal availability provisions. Were such not the case, OVS operators would be subject to greater or lesser obligations than the competing cable operators in the various jurisdictions the OVS operator was serving, contrary to the mandate of the 1996 Act.[23]

**D. Any Authorization That Allows A LEC To Appropriate Public Rights-Of-Way For Its Own Use Requires Just Compensation**

The City believes that any regulations the Commission adopts must not interfere with the local governments' long-standing right to receive compensation on behalf of the public for the profit-making use of valuable public rights-of-way. Local governments act as trustees with regard to public property, and are obligated to ensure that the public receives fair compensation for the use of that property. We consequently agree with those commenters who have observed that the federal

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[23] See Communications Act § 653(c)(2)(A).

government may not authorize the appropriation of valuable public rights-of-way without engaging in a taking of local community property.[24]

In drafting the Cable Act, Congress recognized local government's entitlement to "assess the cable operator a fee for the operator's use of public ways[,]"[25] and established "the authority of a city to collect a franchise fee of up to 5 percent of an operator's annual gross revenue."[26] This fee is the consideration given in exchange for the grant of rights to use public ways. In the context of OVS, the Commission must recognize that it does not have "the authority to limit by regulation the level of [the franchise fee] . . . or to specify the manner in which the income from such fees may be spent."[27] The Commission should not now attempt to alter the federal government's historical recognition of local government's responsibility to require compensation on the public's behalf for the commercial use of public property, or to undermine existing revenue arrangements between local franchising authorities and incumbent cable operators.

Thus, any regulations the Commission adopts regarding local government compensation for the commercial use of public property by an OVS operator must match the obligations of incumbent cable operators in each jurisdiction served by the OVS

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[24] NLC Comments at 52-60; Minnesota Comments at 15;

[25] H.R. Rep. No. 98-934, 98th Cong., 2d Sess. ("Committee Report") at 26, reprinted in 1984 USCCAN at 4663.

[26] Id.; 47 U.S.C. § 542.

[27] Committee Report at 26, reprinted in 1984 USCCAN at 4663.

network.

The City consequently believes that the Communications Act prevents the Commission from promulgating a regulatory scheme that would have the effect of authorizing the use of public property absent just compensation. Contrary to the self-serving arguments advanced by some LECs,[28] the Commission should protect the public interest and avoid derailing the carefully balanced delineation of powers provided by the Communications Act.

## III. CONCLUSION

For the foregoing reasons, the City respectfully recommends that the Commission adopt the approach suggested herein, *viz*: (1) establish safeguards to protect the public from anti-competitive and discriminatory conduct by OVS operators; (2) prohibit the operation of OVS networks by incumbent cable operators or uses that violate the Act's prohibition on joint ventures; (3) require OVS operators to comply with any applicable Title VI requirements including PEG, must-carry, and retransmission consent in each jurisdiction where they provide service; and (4) avoid the authorization of unconstitutional takings.

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[28] Comments of Bell Atlantic, Bellsouth, Lincoln Telephone, Pacific Bell, and SBC Communications, CS Docket No. 96-46 (filed Apr.1, 1996).

Respectfully Submitted,

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